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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

No. _____

WAYMARE BILLUPS,	)
	)
Petitioner,	)
	)
v.	)
	)
SAMUEL GARRISON, Warden, Attorney General of North Carolina,	)
	)
Respondents.	)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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80 pp

QUESTION PRESENTED

Did the trial court's order that petitioner be restrained by leg irons during his trial, based on findings of necessity for such action that are not supported by the record, deprive petitioner of his right to due process of law?

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 718 F.2d 665 (1983). The Order of the United States District Court for the Eastern District of North Carolina, filed Dec. 20, 1982, is unreported. The opinion of the North Carolina Supreme Court in State v. Billups is reported at 272 S.E.2d 841 (N.C. 1981).

These opinions and Order are reproduced in the Appendix hereto.

JURISDICTIONAL STATEMENT

The judgement of the Court of Appeals for the Fourth Circuit was entered on October 6, 1983. Petition for Rehearing was timely filed and was denied by the Court by Order entered January 30, 1984. This petition for certiorari was filed within 90 days of that date.

Jurisdiction of the court below was based on 28 U.S.C. §2254. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Waymare Billups was convicted of the crimes of robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury following a jury trial in the Superior Court of Perquimans County, North Carolina, in February, 1980. On the court's own motion, petitioner was ordered to be placed in leg irons during his trial, despite his objection that the shackling would deny him a fair trial. State v. Billups, 272 S.E.2d 842, 850 (1981). The trial judge made the following findings of fact in support of the use of leg irons at trial: that petitioner was being tried for serious crimes; that other serious charges were pending against him, including appeal from a conviction the previous week for which he had received a sentence of 40 to 50 years; that only one deputy was available to serve as bailiff and

security officer in the courtroom because other deputies were on a special venire in another county; and finally that there was an outstanding warrant for escape against petitioner in another jurisdiction.

Prior to the trial, the petitioner was brought into the courtroom wearing shackles in full view of the entire jury venire. The court then explained to the jury panel that defendant was being shackled because there was only one deputy sheriff to act as security officer for the courtroom. He instructed the jurors to put out of their minds during their deliberations the fact that defendant was wearing shackles during the trial. Billups v. Garrison, 718 F.2d 665, 667 (4th Cir. 1983). After a jury was impaneled, the judge states in his Certificate filed with the court below that "every effort was made" to see that petitioner did not appear in shackles before the jury. There is nothing to indicate, however,

that the jurors could not see the shackles when petitioner sat at counsel table.

Following his conviction, petitioner appealed to the North Carolina Supreme Court, attacking his conviction on several grounds, including the court's order that he be shackled during his trial. The court upheld petitioner's conviction over a dissent by Justice Exum, joined by Justice Copeland, which would have granted petitioner a new trial on the ground that the restraints forced upon him deprived petitioner of a fair trial. State v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981).

On June 29, 1981, petitioner filed this action in the federal District Court for the Eastern District of North Carolina, seeking a writ of habeas corpus based on the shackling issue, pursuant to 28 U.S.C. §2554. Following discovery the district court issued an order dated December 20, 1982, granting

respondent's motion to dismiss. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court over a dissent by Judge Ervin. Petitioner's Petition for Rehearing was denied following a poll of the court, with Judge Murnaghan, Judge Sprouse and Judge Ervin voting in favor of rehearing en banc.

REASONS FOR GRANTING THE WRIT

THE USE OF SHACKLES TO RESTRAIN PETITIONER AT HIS TRIAL PREJUDICED HIS RIGHT TO A FAIR TRIAL AND WAS NOT JUSTIFIED BY A SHOWING OF NECESSITY.

The majority opinion of the Fourth Circuit Court of Appeals sanctions the use of shackles to restrain petitioner at his trial even though he had exhibited no unruly behavior before the court or while awaiting his trial, and even though the record reveals that five armed officers were available and present in the courtroom to provide security. The reviewing courts below deferred to the judg-

ment of the trial judge that the leg irons were necessary to provide security in the courtroom due to a shortage of deputies. The lower courts approved the trial judge's procedure in documenting in a recorded order the reasons for his action. Yet the record in this proceeding establishes, and the State concedes, that the trial judge was mistaken in stating for the record that only one deputy was available to provide security. There were actually five armed officers present during the trial. The ruling by the court below thus approves the use of clearly prejudicial means of restraint upon a defendant without a showing that such means are necessary, and therefore calls for this Court's exercise of supervision in order to protect the right of this petitioner, and of other defendants, to a fair trial before an impartial jury.

Following this Court's warning that a trial judge may order the use of physical

methods of restraint only as a "last resort," Illinois v. Allen, 397 U.S. 337, 344 (1970), a majority of the courts considering the constitutionality of shackling of a defendant at trial have concluded that such action is inherently prejudicial. See, e.g., Kennedy v. Cardwell, 487 F.2d 101, 107 (6th Cir. 1973); United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970); Woodards v. Cardwell, 430 F.2d 978, 982 (6th Cir. 1970); Lous v. United States, 381 F.2d 911 (9th Cir. 1968); Spain v. Rusten, 543 F.Supp. 757 (N.D. Calif. 1981); Boothe v. Superintendent, etc. 506 F.Supp. 1337, 1341 (E.D.N.Y. 1981), reversed on other grounds, 656 F.2d 27 (2nd Cir. 1981); State v. Tolley, 290 N.C. 349, 366, 226 S.E.2d 353, 367 (1976), and cases cited therein.

Despite the undeniable prejudice that results from the shackling of a defendant, it is recognized that in certain extra-

ordinary circumstances, a trial judge may conclude that it is necessary to subject the defendant to restraints. But when the defendant, like Mr. Billups, has done nothing to disrupt courtroom proceedings, it is the State's burden to show that shackling during trial is necessary in order to prevent his escape, protect others in the courtroom or to maintain order in the courtroom. State v. Tolley, 226 S.E.2d 353, 367 (N.C. 1976). The State has never made such a showing in this case. According to the trial judge's statement on the record, the availability of only one deputy sheriff to secure the courtroom was crucial to his decision to order shackling, which was to remain in effect according to his order "until such time as more deputies are made available." In a "Certificate of the Trial Judge" filed with the lower court in this proceeding, Judge Bruce further

explained that in addition to the deputy sheriff, two City of Hertford police officers and a State Highway Patrolman were "available for courtroom security." Nevertheless, the judge concluded, "we were one law enforcement officer short of being able to provide security to prevent the escape of the defendant Waymare Billups without his being shackled." During discovery in the habeas proceeding, the State's answers to petitioner's interrogatories revealed that five armed officers were in fact present in the courtroom during petitioner's trial.

The trial judge's stated reason for ordering shackles at the trial was thus shown by the record in this case to be without foundation. Moreover, the true state of facts should have been apparent to the judge at the time he entered his order. Yet, the majority opinion of the court

below finds the judge's decision to be in effect insulated from meaningful review simply because he recorded findings of fact in support of it which, the court below concludes, adequately support the decision to shackle even though the record reveals the findings to be misleading, or at best incomplete. The Fourth Circuit majority deferred so completely to the trial judge's discretion in this situation that it did not even consider the less restrictive alternatives to shackling which were available to the court at petitioner's trial. Several such alternatives were available to the court, and were pointed out in the dissents of Justice Exum and Judge Ervin below, as well as in petitioner's briefs. The judge could have ordered that the four armed officers in addition to the deputy sheriff, admittedly available in the courtroom, be deputized for the purpose of guarding

petitioner. If five armed officers were not considered enough to prevent petitioner from escaping through one of the two doors of the courtroom during his trial, additional help could have been obtained from the city police department or the state highway patrol, which had lent aid on prior occasions. Additionally, as Judge Ervin suggests in dissent, the judge could have continued the case until adequate security personnel were available, or he could have recalled the Perquimans County personnel from the neighboring county to their own assigned jurisdiction.

The majority opinion below considered none of these alternatives that were available to the trial judge, but merely deferred to the judge's discretion:

> a trial judge must be given wide latitude in arriving at his decision to impose restraints... we can only conclude that the trial court carefully weighed

> relevant factors, took appropriate precautionary measures, and did not so exceed the bounds of his discretion by ordering Billups to be tried in leg irons as to commit a constitutional error.

718 F.2d 665, 669. While the prevailing rule is that a decision to order a defendant to be shackled is within the trial court's discretion, this rule should not be allowed to insulate from all review a judge's decision that a defendant must be deprived of his right to due process of law. When, as here, that decision was actually based not on true necessity but on the court's conclusion that shackling the defendant was the most convenient solution to an alleged security problem, federal courts should not be reluctant to find an abuse of discretion. In federal habeas corpus proceedings, state factual determinations not fairly supported by the record cannot be conclusive of federal

rights. Woodards v. Cardwell, 430 F.2d 978, 981 (6th Cir. 1970).

This Court has handed down guidelines for lower courts for dealing with the situations of an unruly and abusive defendant, Illinois v. Allen, 397 U.S. 337 (1970) and a defendant compelled to be tried in prison garb, Estelle v. Williams, 425 U.S. 501 (1976). This case indicates the need for guidance from the Supreme Court for trial courts dealing with the situation in which security personnel are uneasy about a particular defendant, but the defendant has not been unruly or posed any real threat of escape. Will trial judges be allowed to order such defendants tried in shackles, thus marking them as both guilty and dangerous to society in the view of the jury, when such an action is not shown to be necessary? Petitioner submits that if the constitutional right to a fair trial is not

to be denied him for the sake of convenience, he must be granted a new trial at which he will appear free of physical restraints.

CONCLUSION

For these reasons, petitioner prays this Court to issue its writ of certiorari and to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Prosecution of this action is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 83-6105

Waymare Billups,	)
	)
Appellant,	)
	)
v.	)
	)
Samuel Garrison, Warden; Attorney General of North Carolina,	)
	)
Appellees.	)

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., Chief District Judge.

Argued: May 9, 1983 Decided: October 6, 1983

Before HALL and ERVIN, Circuit Judges; and BUTZNER, Senior Circuit Judge.

HALL, Circuit Judge:

North Carolina prisoner, Waymare Billups, appeals from an order of the district court, dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Finding this appeal to be without merit, we affirm.

I.

On February 19, 1979, Isaac Lowe and his wife, Laura, both in their seventies, were robbed at gunpoint in their home. During the robbery, Mr. Lowe was shot in the head and neck. Billups was subsequently charged with armed robbery and felonious assault. He pleaded not guilty and was tried by a jury in the Superior Court for Perquimans County, North Carolina.

As a security measure, Billups, who was 29 years old and apparently in good health, was restrained by leg irons throughout his trial over the objection of his attorney. Before ordering the defendant restrained, the trial judge, the Honorable R. Michael Bruce, made findings of fact which may be summarized as follows:

> (1) the defendant was charged with armed robbery and assault with intent to kill, inflicting serious injury; (2) defendant had other serious charges, including another charge of armed robbery, pending against him and had the previous week received a sentence of not less than forty nor more than fifty years on a different charge; (3) there was an outstanding warrant for escape against the defendant issued by the State of Maryland; and (4) because many of the sheriff's employees were involved in a special venire which had been summoned from Perquimans County to Dare County there was only one deputy sheriff to serve as bailiff and security officer for the court.

Later, in a certificate filed with the district court in Billups' habeas proceeding, Judge Bruce further elaborated on the conditions which he believed warranted shackling in this case. He noted that in addition to the deputy sheriff, two city policemen and a highway patrolman were present in the courthouse during Billups' trial. Furthermore, the state in its answers to Billups' interrogatories filed in connection with this proceeding, responded that a total of five armed officers were believed to be present in and about the courtroom. However, as Judge Bruce's certificate points out, the additional officers all were assigned duties other than attending to the needs of the court or guarding Billups. Therefore, as Judge Bruce stated in his certificate, he concluded that the court was "one law

enforcement officer short of being able to provide security to prevent the escape of the defendant Waymare Billups without his being shackled."

Before the trial began, Judge Bruce, acknowledging that some members of the jury venire might have observed Billups wearing shackles, instructed the entire jury panel as follows:

> The reason for [the restraints] is that the Sheriff's Department has all of its men over in Dare County and there is only one Sheriff who can serve as Bailiff and also act as security officer for the courtroom. Now, is there any member of the jury panel as it is now constituted that feels that they could not put the fact that the Defendant is shackled out of their mind for the purpose of weighing the evidence or determining the issue of the Defendant's guilt or any other issue in this case. If you feel that would prejudice you, please raise your hand. I am instructing you that if you are selected to sit on this jury to put that fact out of your mind for the purpose of determining the Defendant's guilt or any other issue in this

case. If you can't follow the instruction, raise your hand.

There is no indication in the record that any of the prospective jurors asked to be excused. The record further indicates that this was the only occasion in which any of the jurors may have observed Billups in restraints.[1/]

1/Judge Bruce further certified to the district court that:

> "After the decision was made that Mr. Billups was to be shackled, we made every effort to see that the defendant was not required to walk into or out of the courtroom in the presence of the jury so as not to call attention to the fact that he was shackled. To this end, efforts were made after each recess to see that the defendant was taken in or out of the courtroom after the jury had been sent to their room. The only time the defendant was required to walk in shackles in the presence of the jurors was when he was initially brought into the courtroom for jury selection and the venire was present in the spectator section of the courtroom."

The jury convicted defendant of both charges. Billups appealed to the North Carolina Supreme Court, attacking his conviction on several grounds and specifically citing the trial court's decision to restrain him during trial. A majority of the state Supreme Court upheld Billups' conviction and concluded that under the circumstances shackling of the defendant was not improper. State v. Billups, 301 N.C. 607, 272 S.E.2d 842, 846-848 (1981).

Billups then filed the instant action, seeking a writ of habeas corpus on the ground that the use of restraints deprived him of a fair and impartial trial and infringed upon the presumption of innocence. The district court dismissed this action and Billups appeals.

II.

On appeal, Billups contends that the shackling prejudiced his right to a fair

trial. He further argues that in light of the record in this case the findings of the trial court were inadequate to support the decision to use restraints. Finally, he complains that the decision to use shackles in this instance constituted an abuse of discretion. We disagree and conclude that the shackling imposed under the circumstances present in this case neither deprived Billups of his right to a fair trial nor constituted an abuse of the trial court's discretion.

Both this Court and the North Carolina Supreme Court have previously addressed the issues raised in this appeal and have reached the conclusion that under appropriate circumstances a trial court in its discretion may order the use of restraints without depriving a defendant of his right to a fair trial. See United States v. Samuel, 431 F.2d 610, 433 F.2d 663 (4th

Cir. 1970), cert. denied, 401 U.S. 946 (1971); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).[2/]

In Samuel, we recognized that because an accused is presumed innocent until proven guilty, he is ordinarily entitled to be relieved of handcuffs, or other unusual restraints. Nevertheless, we also recognized that the maintenance of courtroom security and the rights of society at large to be protected from the guilty are proper and necessary factors for the court to consider in any trial. Thus, we held that "in

2/We note that the North Carolina Supreme Court in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976), relied heavily on our decision in Samuel in analyzing the employment of restraints in appropriate cases. We further note that both Samuel and Tolley were cited by the North Carolina Supreme Court in State v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981), for its conclusion that shackling in this particular case was justified.

appropriate circumstances, the accused's right to the indicia of innocence before the jury must bow to the competing rights of participants in the courtroom and society at large. Cf. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)." Samuel, 431 F.2d at 615. We went on to acknowledge the crucial role given to the trial court's discretion in balancing these competing interests:

> The cases traditionally state that accommodation between these conflicting interests lies within the discretion of the [trial] judge. It is he who is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes." (citations Omitted.)[3/]

3/In United States v. Thompson, 432 F.2d 997, 998 (4th Cir. 1970), cert. denied, 401 U.S. 944 (1971), we reiterated that "the ultimate decision [to impose restraints] rests within the sound discretion of the judge."

Finally, in order for a reviewing court to determine whether a trial court has abused its discretion by imposing unusual security measures, we concluded that the reasons for requiring them must be disclosed and that counsel be afforded the opportunity to argue that such measures are unnecessary. Id.

Applying the standards which we approved in Samuel to the facts of this case, we find no such gross abuse of the trial judge's discretion in ordering Billups to be restrained by leg irons for the duration of his trial as to amount to constitutional error. This decision was based upon information made available to the court before Billups' trial. Among other things, the trial judge knew that Billups had other serious charges, including another charge of armed robbery, pending against him and that just the week before he had received a sentence of 40 to 50 years

imprisonment. Moreover, the trial judge was made aware of an outstanding warrant for escape issued against Billups by another state. The reasons for imposing restraints were adequately documented by the trial judge in his findings of fact and Billups' counsel had the opportunity to and did in fact protest the decision to use shackles.

Nor are we persuaded by appellant's argument that the record, when viewed as a whole, fails to justify his shackling. The record, as amplified by the discovery conducted in the habeas proceeding, reveals that the Sheriff's Department, which normally provides courtroom security in North Carolina, was, as trial judge Bruce found, shorthanded the week of the trial; that the additional uniformed, armed officers, who were either in the courtroom or adjacent to it in the courthouse, were assigned duties other than guarding Billups;

that the courtroom design made it an unsecure area; and that Billups posed more than an average escape risk. Finally, the record reveals that the jurors observed Billups in shackles at most one time, that Judge Bruce issued appropriate cautionary instructions to ensure that Billups would not be prejudiced by that fact, and that steps were taken to ensure that during trial the jurors would not see Billups in shackles.

III.

In view of his determination in this case that courtroom security was inadequate, we are unable to say that the trial judge committed constituional error in finding it necessary to restrain Billups during his trial. A trial judge must be given wide latitude in arriving at his decision to impose restraints, and to base his decision on the information available to him at the

time of trial. Given the facts of this case, we can only conclude that the trial court carefully weighed all relevant factors, took appropriate precautionary measures, and did not so exceed the bounds of his discretion by ordering Billups to be tried in leg irons as to commit constitutional error. Accordingly, the district court's order, dismissing Billups' petition for a writ of habeas corpus, is hereby affirmed.

A F F I R M E D.

ERVIN, Circuit Judge, dissenting:

Waymare Billups was required to stand trial in shackles. On its own motion, the state superior court ordered the restraints, and its exercise of discretion was upheld by the North Carolina Supreme Court over a dissent written by Justice Exum and joined by Justice Copeland. State v. Billups, 272 S.E.2d 842 (1981). Because I agree with Justice Exum that the shackling order was an unconstitutional abuse of discretion, I respectfully dissent.

The trial judge's order was based primarily on his belief that only one deputy sheriff was available to provide security in the courtroom. The judge made four findings that, in his view, justified shackling Billups: the serious nature of the crime for which Billups was to be tried; the existence of other serious charges against Billups, and his felony conviction the week

before; the existence of a Maryland escape warrant outstanding against Billups; and the availability of only one deputy sheriff to serve in the courtroom. In ordering the restraints, however, the judge stated that they were necessary "until such time as more deputies are made available." The judge once again mentioned the shortage of deputies in his instruction concerning the shackles. It seems clear, therefore, that it was the "shortage of deputies problem," Billups, 272 S.E.2d at 851 (Exum, J., dissenting), which was crucial to the trial judge's decision.

The state now concedes that the trial judge was mistaken and that there were actually four or five armed officers present during the trial. This concession undermines the essential factual predicate for the shackling order and is not answered by the post hoc justification that the additional

officers were not assigned to guard Billups. Furthermore, even if I accepted that explanation of the trial judge's factual error, I do not think his order can be reconciled with the governing rule of law. A trial judge may order the use of visible methods of restraint only as a "last resort," Illinois v. Allen, 397 U.S. 337, 344 (1970), and "in extraordinary circumstances." State v. Tolley, 226 S.E.2d 353, 366 (N.C. 1976). Because "a trial in shackles is inherantly prejudicial," the trial judge has discretion to order the defendant restrained only when "it is shown by the State to be necessary notwithstanding any such prejudice." Tolley, 226 S.E.2d at 367. The state has never made this showing.[1/] The Constitution

1/As Justice Exum's dissent makes plain, none of the suggested reasons for shackling Billups will support the trial judge's decision:

(Footnote Continued)

(Footnote Continued)

> There is no indication in the record that defendant at the time of his trial posed a threat to any person in the courtroom, was likely to be unruly or disruptive, or was likely to try to escape. All indications are that he would do none of these things. That defendant is charged with serious crimes, is young and healthy, and has recently been convicted of other serious crimes does not justify the shackles. Although these are among the "material circumstances" which in a proper case may be considered, our courts regularly try young, healthy defendants who have criminal records and who are on trial for serious offenses; yet we do not shackle them. These trials include, of course, even those defendants who have escaped from penal institutions. That only one deputy was available cannot be seized upon as a justification. The absence of adequate courtroom staff was an administrative problem which the trial court should not have solved at the expense of defendant's right to a fair trial. The most telling circumstance of all is that defendant sat quietly through his uneventful trial on other charges held the previous week and at his preliminary hearing. It thus appears that the trial court, seeking to solve a shortage of deputies problem, simply decided sua sponte to shackle defendant unnecessarily. Neither the state nor any representative of the county, so far as the record reveals, advised the court of feelings of insecurity or any felt need for restraining defendant.

Billups, 272 S.E.2d at 851 (Exum, J. dissenting).

does not permit the placing of visible restraints on a criminal defendant -- restraints which can "mark [the defendant] as an obviously bad man or . . . suggest that the fact of his guilt is a foregone conclusion," United States v. Samuel, 431 F.2d 610, 614-5 (4th Cir. 1970), cert. denied, 401 U.S. 946 (1971) -- for the mere convenience of the government.

The state's position is further weakened by the fact that there were numerous less intrusive remedies available to the trial judge. He could have sent for additional officers or pressed one or more of the city or state officers waiting in the courtroom or the courthouse into service as courtroom deputies. We are told that they were assigned "other duties" but the record is silent as to what those duties were. It is not unreasonable to suspect that some of these armed officers were there as witnesses

in this or other cases, and would be in or around the courtroom in any event. Deputizing some of them would not have created any major problems for them or interfered with their duties. As another alternative, the trial judge could have continued the case for whatever period of time was necessary to bolster the courtroom security force. I would even suggest that he could have considered recalling some of the Perquimans County deputies from Dare County, for after all, their principal responsibilites were in their assigned jurisdiction.[2/]

Even if shackling was the only viable solution, a view I reject, the trial judge did not see to it that Billups' rights were fully protected. As I read the trial judge's certification, he admits that <u>after the</u>

2/<u>See Billups</u>, 272 S.E.2d at 851 n.2 (Exum, J., dissenting).

decision was made to shackle Billups, Billups was required to walk in shackles in the presence and sight of the jurors when he was being initially brought into the courtroom for jury selection. This exposure was completely unnecessary, for all prospective jurors could have been excluded from the courtroom long enough to bring Billups in and seat him at counsel table. By use of table placements or baffleboards, his leg irons could have been concealed from the jurors' view. The trial judge apparently consistently excused the jury before Billups was moved during the course of the trial, but by then the damage had already been done.

Unlike the majority, I take no comfort from the trial judge's so-called curative instructions. In the first place, these instructions served to call attention to the fact that Billups was in shackles, thereby causing any juror who had failed to

notice his condition to become aware of it. They were directed to the panel as a group and as any experienced trial judge or lawyer knows, jurors so addressed rarely ever respond to such inquiries. Arguably, they also violated the spirit, if not the letter, of N.C.G.S. § 15A-1031 (1) which states in part:

> If the judge orders a defendant restrained he must:
>
> (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action.

The curative instruction given to the jury contains some of the reasons for the trial judge's actions.

I am also troubled by the fact that most of the cases cited by the majority to uphold the trial judge's actions are cases involving disruptive defendants: Billups simply fails to qualify as such. The use of

shackles is a harsh, "last ditch" measure which should not be tolerated in a fact situation like this one.

I am reluctant to conclude that the trial judge abused his discretion in this case. However, when it is clear that there were numerous less prejudicial solutions to the judge's perceived problem, all of which would have been preferable to the one he chose and which could have been employed without jeopardizing the security he sought, I am compelled to conclude that there was an abuse of discretion.

I would reverse the judgment of the district court and remand the case with instructions to issue a writ of habeas corpus.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 81-430-HC

WAYMARE BILLUPS,	)	
	)	
Petitioner	)	
	)	
v.	)	O R D E R
	)	
SAM GARRISON,	)	
Warden, etc.,	)	
	)	
Respondent.	)	

Petitioner, a state prisoner, brought this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He propounded interrogatories which respondent has answered, and the action is currently before the court on respondent's motion to dismiss. The parties have thoroughly briefed their respective positions and the action is ripe for disposition. Upon careful review of the record, the court finds that the writ should not issue.

Petitioner was charged with armed

robbery and felonious assault. After a jury trial before the Honorable R. Michael Bruce in the Superior Court of Perquimans County, he was convicted of both charges and sentenced to life imprisonment on the armed robbery charge and a consecutive sentence of ten years on the assault charge. Over the objection of his attorney, petitioner was shackled throughout his trial by order of the trial judge. Petitioner filed a direct appeal to the North Carolina Supreme Court attacking his conviction on various grounds including the trial court's decision to restrain him during his jury trial. The Supreme Court addressed all of petitioner's allegations of error and upheld his conviction. State v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981). Petitioner filed this application for relief based solely on the fact that he was shackled during his trial. Because this contention has been presented

to the highest state court, petitioner has exhausted his available state court remedies and this court may consider his application.

Petitioner contends that he was denied a fair and impartial trial because he was shackled in the presence of the jury and that the trial judge's decision infringed on the constitutionally-guaranteed presumption of innocence. He asserts that the use of shackles was inherently prejudicial and may have influenced the jury's verdict.

The North Carolina Supreme Court addressed this claim and took into account that the trial court on its own motion made the following findings of fact before ordering that the defendant be restrained:

> (1) that the defendant was charged with armed robbery and assault with intent to kill inflicting serious injury; (2) that defendant had other serious charges pending against him and had the previous week received a sentence of not less than forty nor more than fifty years on a different charge; (3) that there was

> an outstanding warrant for escape against the defendant issued by the State of Maryland; and (4) that because many of the sheriff's employees were involved in a special venire which had been summoned from Perquimans County to Dare County there was only one deputy sheriff to serve as bailiff and security officer for the court.

The North Carolina Supreme Court considered petitioner's claim that he had not previously tried to escape, nor was there any evidence of a planned escape. The court concluded that the trial judge had not abused his discretion in ordering that petitioner be shackled during the course of his jury trial. While mindful that the use of shackles should be a last resort, Illinois v. Allen, 397 U.S. 337 (1970), the court recognized that the trial judge was best equipped to decide the types of security measures which should be used to prevent disruption of the trial, harm to those in the courtroom, escape of the accused and prevention of other crimes.

United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970), cert. denied, 401 U.S. 946 (1971).

The court predicated this decision on the guidelines set forth in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976). In Tolley, the North Carolina Supreme Court ruled that the use of shackles was not fundamentally unfair in every instance and that the court should consider a broad range of factors including the defendant's age and physical attributes, past record of escapes or attempted escapes, the physical security of the courtroom and the adequacy and availability or alternative remedies. 290 N.C. at 368, 226 S.E.2d at 368. The court found that the trial judge framed his order as required by Tolley and ruled that petitioner failed to show any prejudice in his trial arising out of the use of shackles. State v. Billups, 301 N.C. at 614, 272 S.E.2d at 847-48.

In this court's view the petitioner has failed to present special circumstances which would warrant a reversal by this court of this decision of the highest state court which has disposed of constitutional issues on the merits and has specifically set forth reasons showing no denial of due process. Smith v. Baldi, 344 U.S. 561 (1953).[1/]

Accordingly, respondent's motion to dismiss is allowed and the action is dismissed.

SO ORDERED.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

December 20, 1982.

1/The court is mindful of the dissent filed in State v. Billups and agrees that the record reflects an inconsistency concerning the number of deputies who were available during the course of the trial. The main thrust of the dissent, however, is the absence of evidence of escape attempts while petitioner was incarcerated in Perquimans County and it does not in the opinion of this court give proper weight to the fact that there was an outstanding warrant in Maryland charging him with escape in that state.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-6105

Waymare Billups,	)
	)
Appellant,	)
	)
v.	)
	)
Samuel Garrison, Warden; et al,	)
	)
Appellees.	

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge

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The appellant's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. Upon the request for a poll of the court on the suggestion for rehearing en banc, Chief Judge Winter, Judge Russell, Judge Widener, Judge

Hall, Judge Phillips and Judge Chapman, voted against rehearing en banc; Judge Murnaghan, Judge Sprouse and Judge Ervin voted in favor of rehearing en banc.

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing en banc are DENIED.

Entered at the direction of Judge Hall with the concurrence of Judge Butzner. Judge Ervin dissents.

For the Court

_____

CLERK

STATE of North Carolina

v.

Waymare BILLUPS.

No. 63.

Supreme Court of North Carolina.

Jan. 6, 1981.

Defendant was convicted in the Superior Court, Perquimans County, R. Michael Bruce, J., of robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant appealed. The Supreme Court, Carlton, J., held that: (1) the trial court did not err in refusing to grant defendant's request for a continuance based on defendant's complaint that he lacked confidence in his court-appointed attorney where defendant was adequately represented by counsel at trial; (2) even if certain of witness answers were in places speculative or unresponsive, there

was no indication that error in admitting such testimony was either material or prejudicial; (3) under the circumstances, the trial court acted properly in shackling defendant; (4) curative instruction given by the court concerning the shackling of defendant was not insufficient, and the fact that the instruction was not repeated to the jury when other instructions were given did not require reversal where defendant did not request an additional instruction; (5) trial court did not err in allowing the prosecuting witnesses to identify defendant in court based on voir dire testimony which revealed that both witnesses had had an adequate opportunity to see defendant; (6) even though a purse and its contents found upstairs in the home of prosecuting witnesses may have been irrelevant in the prosecution, defendant failed to establish any error in admitting such evidence; and (7) the trial court did not err in deny-

ing defendant's motion for mistrial based on the fact that one of the prosecuting witnesses entered the jury room during a recess at the conclusion of the trial, but prior to the charge of the court where witness did not communicate with any of the jurors while she went through the jury room in order to use the restroom.

No error.

Exum, J., dissented and filed opinion in which Copeland, J., joined.

Defendant was charged in separate indictments, proper in form, with the crimes of robbery with a dangerous weapon, a violation of G.S. 14-87, and assault with a deadly weapon with intent to kill inflicting serious injury, a violation of G.S. 14-32. Defendant pleaded not guilty to both charges.

Prior to trial, defendant made a motion to suppress the victims' identification of him. After a voir dire hearing at trial, at

which the State presented four witnesses, the judge made findings of fact and conclusions of law and denied the motion.

At trial, the State's evidence tended to show that on the night of 19 February 1979 Mr. and Mrs. Isaac Lowe were in their home in Hertford, North Carolina. A little after 9:00 p.m., a man knocked at the Lowe's door and asked about renting a room from the Lowes. Mrs. Lowe admitted him to the living room where he began to talk with her husband while she resumed watching television. After several minutes on conversation, the man drew a gun on the Lowes and demanded money. He removed approximately $86.00 from a wallet he took from Mr. Lowe, and also picked up $100.00 in cash which was lying on a table. He then ordered the Lowes to go upstairs.

Mr. Lowe reached the top of the stairs first, and retrieved a pistol which he had hidden under the pillow on his bed. As the

intruder reached the top of the steps, Mr. Lowe testified he fired once at his feet hoping to scare him away. The intruder fired three times at Mr. Lowe, wounding him in the head and neck. As Mrs. Lowe began to scream for help, the intruder fled.

Both the Lowes identified the defendant in court as the man who robbed them and shot Mr. Lowe.

By way of rebuttal, defendant offered the testimony of his mother. She stated that to the best of her knowledge her son was not in Hertford at the time of the crimes. Defendant's sister offered similar testimony.

The jury returned a verdict of guilty on both charges. The defendant was sentenced to life imprisonment for the armed robbery and to a term of ten years for assault with a deadly weapon inflicting serious injury. Defendant appeals the life sentence as a matter of right; his motion to bypass the

the Court of Appeals on the latter conviction was allowed on 16 July 1980.

Where necessary, other relevant facts will be discussed in the body of this opinion.

CARLTON, Justice.

From numerous exceptions at trial, defendant brings forward nine assignments of error. We find no prejudicial error and affirm.

(Sections I and II of the opinion are not relevant to the issue presented and are omitted).

By his next two assignments of error, defendant contends that the court erred in ordering that the defendant be restrained in the courtroom by the use of shackles, and that the curative instruction given the jury by the court was insufficient. On its own motion the trial court made the following findings of fact before ordering that the defendant be so restrained: (1) that the defendant was charged with armed robbery

and assault with intent to kill inflicting serious injury; (2) that defendant had other serious charges pending against him and had the previous week received a sentence of not less than forty nor more than fifty years on a different charge; (3) that there was an outstanding warrant for escape against the defendant issued by the State of Maryland; and (4) that because many of the sheriff's employees were involved in a special venire which had been summoned from Perquimans County to Dare County there was only one deputy sheriff to serve as bailiff and security officer for the court. Based on those findings the defendant was ordered shackled until such time as more deputies might become available.

Defendant's primary contention before this Court was that Judge Bruce's decision was based only on circumstances within the courtroom. The defendant argues that absent

a showing that he had previously tried to escape or evidence of a planned escape, Judge Bruce abused his discretion in ordering that defendant be shackled. We disagree.

The seminal decision on this question, recognized as controlling by both sides, is State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976). Justice Huskins, writing for the Court, presented an exhaustive analysis of the issue here considered. As stated there, the general rule is that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances. However, as stated in Tolley, the general rule does not lead to the conclusion that every trial in shackles is fundamentally unfair. Id. at 367, 226 S.E.2d at 367. Rather, "the rule against shackling is subject to the exception that the trial judge, in the exercise of his sound discretion, may require the accused to be

shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial." Id. at 367, 226 S.E.2d at 367. The trial judge "is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes." United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970), cert. denied, 401 U.S. 946, 91 S.Ct. 964, 28 L.Ed.2d 229 (1971).

In reaching a decision as to whether a defendant should be shackled, Tolley lists a broad range of factors including "the seriousness of the present charge against the defendant;...his age and physical attributes;... past escapes or attempted escapes;...the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies." 290 N.C. at 368, 226

S.E.2d at 368. Furthermore, "[t]he information upon which the judge acts need not come from evidence formally offered and admitted at the trial." Id.

Applying those criteria to the case sub judice, it is clear that Judge Bruce properly framed his order as required by Tolley. The record shows that the defendant was charged with crimes of violence; that he was 29 years old and apparently in good health; that other serious charges were pending against him including an appeal from a conviction the previous week for which he received a forty to fifty year prison sentence; that only one deputy was available to serve as bailiff and provide security in the courtroom; and that there was a warrant outstanding charging him with escape from another jurisdiction.

Defendant argues that because a warrant is not a conviction, the existence of an outstanding warrant was irrelevant and should

not have been considered by the trial court. While evidence of a warrant prior to conviction is improper for certain purposes in a criminal proceeding, that rule clearly does not control this situation. The existence of such a warrant for escape from another jurisdiction is probable cause to believe the defendant had escaped from custody on a previous occasion. Defendant's propensity to escape must be one of the overriding considerations in determining whether a defendant should be shackled. Any reasonable evidence of such propensity may properly be considered by the trial court on this questions. Thus, Judge Bruce properly considered the existence of the warrant for escape in reaching his decision.[1/]

1/In Patterson v. Estelle, 494 F.2d 37 (5th Cir. 1974) the court cited the fact that there was an outstanding charge of escaping from custody against the defendant as one factor justifying the handcuffing and chaining of the prisoner during trial. Id. at 38.

Defendant's further argument that restraint is proper only if there is evidence of a past or planned escape attempt is also not persuasive. "[A] trial court need not wait until an escape or other violence has occurred in its presence before exercising its discretion." State v. Johnson, 122 Ariz. 260, 594 P.2d 514, 526-27 (1979). Where there appears some reasonable basis upon which the judge concluded, in the exercise of his sound discretion, that it was necessary for the defendant to be shackled during trial, we cannot say, as a matter of law, that the trial judge abused his discretion. State v. Tolley, 290 N.C. at 371, 266 S.E.2d at 369.

Even if we were to find that shackling of the defendant was improper, that alone would not mandate reversal. The United States Supreme Court has recognized that "the sight of shackles and gags might have a significant effect on the jury's feelings about

the defendant...." Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353, 359 (1970). But, in considering the analogous issue of jail clothing, that Court has also indicated the fact that a defendant appears at trial in prison clothing may not always be prejudicial. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). For that reason the harmless error rule has often been applied to cases where a defendant has appeared for trial so garbed. Thomas v. Beto, 474 F.2d 981 (5th Cir.), cert. denied, 414 U.S. 871, 94 S.Ct. 95, 38 L.Ed.2d 89 (1973); Watt v. Page, 452 F.2d 1174 (10th Cir. 1971), cert. denied, 405 U.S. 1070, 92 S.Ct. 1520, 31 L.Ed.2d 803 (1972). Apparently "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." Estelle v. Williams, 425 U.S. at 508, 96 S.Ct. at 1695, 48 L.Ed.2d at

133. It is, of course, impossible for us to know whether the shackling of the defendant in this case had the adverse effect complained of by defense counsel, or whether perhaps it evoked sympathy for the defendant from the jury. See State v. Reid, 114 Ariz. 16, 559 P.2d 136 (Ariz. 1976), cert. denied, 431 U.S. 921, 97 S.Ct. 2191, 53 L.Ed.2d 234 (1977). Suffice it to say that no showing of prejudice has been presented to us, nor do we perceive any.

Nor does the fact that the trial court did not employ less restrictive security measures afforded defendant a sufficient basis for relief.[2/] There is nothing in the record to indicate that other means were

2/Among the cases holding that the mere fact of handcuffing does not alone warrant reversal see United States v. Kress, 451 F.2d 576 (9th Cir. 1971) and McDonald v. United States, 89 F.2d 128 (8th Cir. 1937).

available, and no such other means were proposed by the defendant. Defendant's failure to suggest alternatives to the shackling precludes his arguing on appeal that less restrictive but equally effective means were available. See State v. Tolley, 290 N.C. at 370, 226 S.E.2d at 369. Moreover, the trial court limited its order to such time as other deputies might be available, an indication of the court's recognition of the gravity of its decision to shackle the defendant. We hold that under the authority of State v. Tolley, supra, the trial court did not abuse its discretion by ordering, after making sufficient findings of fact as also required by Tolley[3/], that the defendant be restrained.

Defendant's argument that the curative

3/We note in passing that State v. Tolley does not require, as defendant urges, that the trial court conduct a full evidentiary hearing before ordering the defendant restrained. All that is required is that the record reflect the reasons for the judge's action. 290 N.C. at 368, 226 S.E.2d at 368.

instruction given by the court was insufficient is equally without merit for two reasons. First, an examination of Judge Bruce's instruction to the jury[4/], given just prior to the beginning of trial, shows that he told the jury that the defendant was being restrained only because the sheriff's department was shorthanded.[5/] No mention was made of the nature of the charges nor was any reference made to defendant's record or character. The judge asked all who would be unable to overlook the shackling of the

4/In relevant part, Judge Bruce explained the shackling by saying, "The reason for this is that the Sheriff's Department has all of its men over in Dare County and there in (sic) only one Sheriff who can serve as Bailiff and also act as security officer for the courtroom."

5/A similar instruction which explained defendant's appearance in handcuffs and leg irons as necessary because the trial was being held in a makeshift courtroom was upheld in People v. Burnett, 251 Cal. App.2d 651, 59 Cal. Rptr. 652 (Court of Appeal 1967).

defendant to raise their hand. None did. The trial judge also specifically instructed the jury to put the fact of defendant's shackles out of their minds in determining his guilt. This instruction fully complied with the applicable tenets of State v. Tolley, 290 N.C. at 369, 226 S.E.2d at 368-69. Second, we note that although defendant complains that the instruction was not repeated to the jury at the time other jury instructions were given, defendant did not request an additional instruction. The burden was on him to do so. State v. Tolley, 290 N.C. at 371, 226 S.E.2d at 370; accord, State v. Stewart, 276 N.W.2d 51 (Minn. 1979); State v. Cassel, 48 Wis.2d 619, 180 N.E.2d 607 (1970). In the absence of such a request, the trial court did not err in not repeating the instruction. Cf. Patterson v. Estelle, 494 F.2d 37 (5th Cir.), cert. denied, 419 U.S. 871, 95 S.Ct. 130, 42 L.Ed.2d 110 (1974) (where no

request for instruction concerning shackling requested, state court did not err in failing to give one). The trial in this case lasted less than two days. Defendant's mere speculation that the curative instruction was not sufficiently fresh in the jury's mind is without merit. These assignments of error are overruled.

(Sections IV-VII of the opinion are not relevant to the issue presented and are omitted).

No Error.

BROCK, J., took no part in the consideration or decision of this case.

EXUM, Justice, dissenting.

I respectfully dissent from the majority opinion because I believe there were insufficient grounds upon which to order, over defendant's objection, his shackling at trial. The shackling thus denied defendant due

process of law under both the Fourteenth Amendment to the Federal Constitution and Article I, Section 19, of the State Constitution.

Due process requires that persons accused of a crime receive the "fundamental liberty" of a fair and impartial trial, and that such persons be afforded the presumption of innocence. Drope v. Missouri, 420 U.S. 162 (95 S.Ct. 896, 43 L.Ed.2d 103 (1975). To implement this presumption courts must guard against factors which may "undermine the fairness of the fact-finding process" and thereby dilute "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt...." Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976), quoted in State v. Tolley, 290 N.C. 349, 365, 226 S.E.2d 353 (1976). It follows, then, that the presumption of innocence requires the garb of

innocence, for "regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." Eaddy v. People, 115 Colo. 488, 492, 174 P.2d 717, 718 (1946), quoted in State v. Tolley, supra. As recognized by the United States Supreme Court in Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970):

> "But even to contemplate [binding and gagging a defendant], much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." (Emphasis supplied.)

Accordingly, this Court in Tolley, held that a criminal defendant is entitled to appear at

trial free from shackles except in extraordinary circumstances where such action is necessary to prevent escape, to protect persons in the courtroom, or to maintain order during trial. The trial court in determining whether such extraordinary circumstances do in fact exist may consider various "material circumstances." State v. Tolley, supra[1/].

1/As noted in Tolley: "The 'material circumstances' which the trial judge may consider in exercising his sound discretion include, inter alia, the seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past records; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others, the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies." 290 N.C. at 368, 226 S.E.2d 353.

The majority, in upholding the shackling here, notes that defendant was charged with crimes of violence, was 29 years old and in good health, and had recently been convicted on other charges and sentenced to a lengthy prison term; that only one deputy was available to provide for courtroom security; and that there was an outstanding warrant from Maryland charging defendant with escape from a penal institution. I respectfully submit the simple existence of all the factors listed does not justify shackling defendant without some other indication that shackling was in fact necessary to prevent his escape, to protect persons in the courtroom, or to maintain order during trial. In so doing I recognize that the propriety of shackling is originally entrusted to the discretion of the trial court. Although the abuse of discretion standard is inherently flexible, it is not without limits. As noted by this Court in

Tolley, "sound judicial discretion means 'a discretion that is not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.'" State v. Tolley, supra, 290 N.C. 349, 367, 226 S.E.2d 353, quoting Langnes v. Green, 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520 (1931). It is my opinion that the trial court here exceeded the limits of sound judicial discretion.

There is no indication in the record that defendant at the time of his trial posed a threat to any person in the courtroom, was likely to be unruly or disruptive, or was likely to try to escape. All indications are that he would do none of these things. That defendant is charged with serious crimes, is young and healthy, and has recently been convicted of other serious crimes does not

justify the shackles. Although these are among the "material circumstances" which in a proper case may be considered, our courts regularly try young, healthy defendants who have criminal records and who are on trial for serious offenses; yet we do not shackle them. These trials include, of course, even those defendants who have escaped from penal institutions. That only one deputy was available cannot be seized upon as a justification. The absence of adequate courtroom staff was an administrative problem which the trial court should not have solved at the expense of defendant's right to a fair trial.[2/] The most telling circumstance of all is that defendant sat quietly through his uneventful trial on other charges held the

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2/The proper solution to this problem would have been for the trial court to have secured other personnel such as state highway patrolmen, if possible, if not, the trial should have been delayed until sufficient personnel could be secured.

previous week and at his preliminary hearing.

It thus appears that the trial court, seeking to solve a shortage of deputies problem, simply decided sua sponte to shackle defendant unnecessarily.[3/] Neither the state nor any representative of the county, so far as the record reveals, advised the court of feelings of insecurity or any felt need for restraining defendant.

The facts in State v. Tolley, supra, 290 N.C. 349, 226 S.E.2d 353, the only decision rendered by this Court as to the propriety of

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3/The court instructed the jury, in pertinent part, as follows: "One more thing, ladies and gentlemen, I want you people who are on the venire to also listen to this. Some of you may have noticed that the defendant is partially restrained in that he has on what are commonly referred to as shackles or leg irons. The reason for this is that the Sheriff's Department has all of its men over in Dare County and there is only one Sheriff who can serve as Bailiff and also act as security officer for the courtroom."

shackling and in which we unanimously approved the shackling, are significantly different from those here. In Tolley, the sheriff, charged with custody of defendant during the trial, expressed the opinion that shackles were necessary. In Tolley defendant tried to escape during the preliminary hearing. Importantly, also in Tolley, defendant's counsel did not object to the shackling when explicitly asked if he wished to do so. Thus, while we noted in Tolley that defendant was charged with serious offenses, and was young and in good physical condition, these "material circumstances" were clearly secondary to the prior escape attempt during the preliminary hearing, the sheriff's request, and the lack of objection by defendant himself, through counsel.

The thrust of Tolley is that while shackling does not always violate a defendant's right to due process under the law, it is a

remedy to be used only in extraordinary situations. The simple existence of several of the "material circumstances" there mentioned does not automatically justify shackling. Only in the extraordinary event that these circumstances together with other actions by defendant himself or concern expressed by those in charge of his prosecution or custody indicate that shackling is necessary to prevent his escape, to protect persons in the courtroom, or to maintain order during trial, should a remedy so damaging to the trial's impartiality be used.

Finally, the majority notes that "no showing of prejudice has been presented to us, nor do we perceive any." This Court, however, has stated that "in the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is inherently prejudicial in that it so infringes upon the presumption of innocence

that it 'interferes with a fair and just decision of the question of ... guilt or innocence.'" (Emphasis supplied.) State v. Tolley, supra, 290 N.C. at 366, 226 S.E.2d 353, quoting Blair v. Commonwealth, 171 Ky. 319, 328, 188 S.W. 390, 393 (1916). The state contends that even if the shackling was improper the error was cured by the trial judge's instruction. My view is that if the shackling was not justified in the first place the error cannot be cured by instructions to the jury. We do a great disservice to the dignity and integrity of our courts when we permit the needless shackling of criminal defendants. I vote for a new trial for defendant at which he will not be shackled unless the circumstances then are such that shackling is required.

COPELAND, J., joins in this dissent.

UNITED STATES COURT OF APPEALS

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No. 83-6105

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Appellant,	)
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v.	)
	)
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Appellees.	

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge

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The appellant's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. Upon the request for a poll of the court on the suggestion for rehearing en banc, Chief Judge Winter, Judge Russell, Judge Widener, Judge

Hall, Judge Phillips and Judge Chapman, voted against rehearing en banc; Judge Murnaghan, Judge Sprouse and Judge Ervin voted in favor of rehearing en banc.

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing en banc are DENIED.

Entered at the direction of Judge Hall with the concurrence of Judge Butzner. Judge Ervin dissents.

For the Court

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CLERK